**Workplace Safety and Insurance Appeals Tribunal**

505 University Avenue 7th Floor
Toronto ON M5G 2P2
Tel: (416) 314-8800
Fax: (416) 326-5164
TTY: (416) 212-7035
Toll-free within Ontario:
1-888-618-8846

Web Site: www.wsiat.on.ca

**Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail**

505, avenue University, 7e étage
Toronto ON M5G 2P2
Tél. : (416) 314-8800
Téléc. : (416) 326-5164
ATS : (416) 212-7035
Numéro sans frais dans les limites de l'Ontario : 1-888-618-8846

Site Web : www.wsiat.on.ca

Ontario

# Workplace Safety and Insurance Appeals Tribunal

## Quarterly Production and Activity Report

## April 1 to June 30, 2011

Production Summary ..... 2
Production Tables and Charts ..... 3
Judicial Review Activity ..... 7
Recent Decisions ..... 17

## Production Summary

- At the end of the second quarter 2011, the active inventory totalled 4,019. This represents the eleventh consecutive quarter where the inventory has fluctuated very little (+/- 5%) as compared with its current level.

- Incoming appeals numbered 1084, of these 895 were appeals from WSIB decisions and 189 appellants advised they were ready to proceed to hearing following a period of inactive status.

    - This compares to 887 new appeals and 224 reactivated appeals recorded in the first quarter of 2011.
    - In the 2nd quarter of 2010 the Tribunal recorded 901 new appeals and 121 reactivations.
    - In 2010, the weekly average of hearing-ready appellants was 56. For Q2-2011, the weekly average of hearing-ready appellants is 57. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 993. This includes 308 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts and 685 after-hearing dispositions; of the after-hearing dispositions, 666 followed from Tribunal decisions.

- At the end of Q2-11, the inactive inventory was 2,810 cases (at the end of Q1-11, the inactive inventory was 2,964 cases).

- In Q2-11, 90% of final decisions were released within 120 days. In 2010, 84% of final decisions were released within 120 days.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the second quarter of 2011, the notice inventory included 1,367 dormant cases, the active inventory totalled 4,019 cases, and the inactive inventory totalled 2,810 cases.

## Production Tables and Charts

A. Active Inventory end of Quarter

| Period | Active Inventory |
|---|---|
| Q1-2010 | 3867 |
| Q2-2010 | 3864 |
| Q3-2010 | 3879 |
| Q4-2010 | 3860 |
| Q1-2011 | 3895 |
| Q2-2011 | 4019 |

B. Incoming Appeals

| Period | Incoming Appeals |
|---|---|
| Q1-2010 | 1036 |
| Q2-2010 | 1022 |
| Q3-2010 | 998 |
| Q4-2010 | 995 |
| Q1-2011 | 1111 |
| Q2-2011 | 1084 |

C. Dispositions

| Period | Dispositions – total | Pre-hearing | After Hearing |
|---|---|---|---|
| Q1-2010 | 1018 | 326 | 692 |
| Q2-2010 | 943 | 319 | 624 |
| Q3-2010 | 915 | 313 | 602 |
| Q4-2010 | 1031 | 323 | 708 |
| Q1-2011 | 993 | 287 | 706 |
| Q2-2011 | 993 | 308 | 685 |

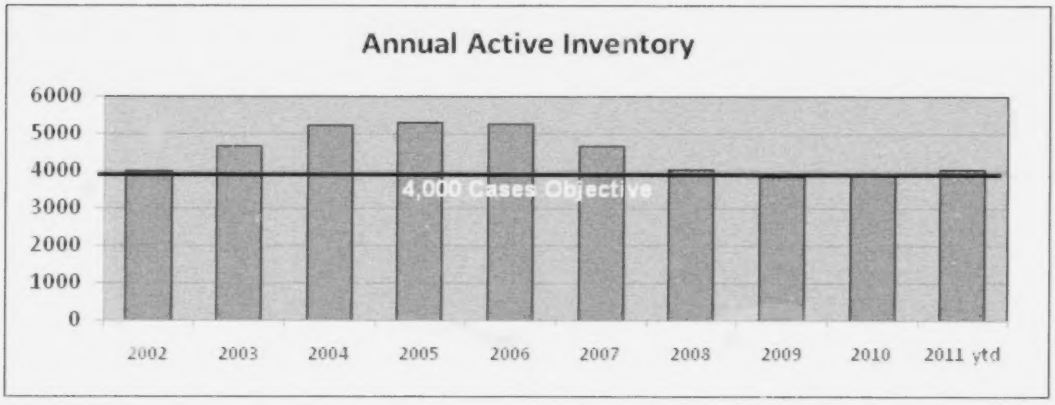
D. Inactive Inventory

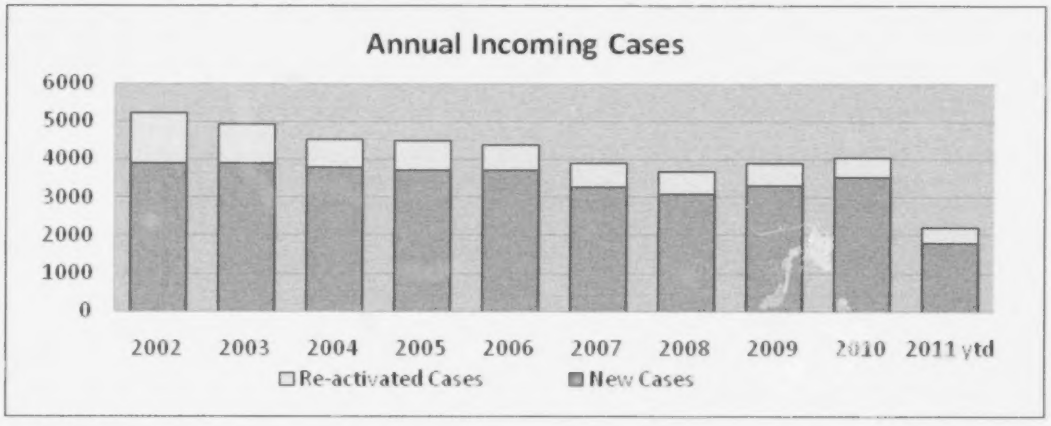
| Period | Inactive Inventory |
|---|---|
| Q1-2010 | 3321 |
| Q2-2010 | 3274 |
| Q3-2010 | 3215 |
| Q4-2010 | 3159 |
| Q1-2011 | 2964 |
| Q2-2011 | 2810 |

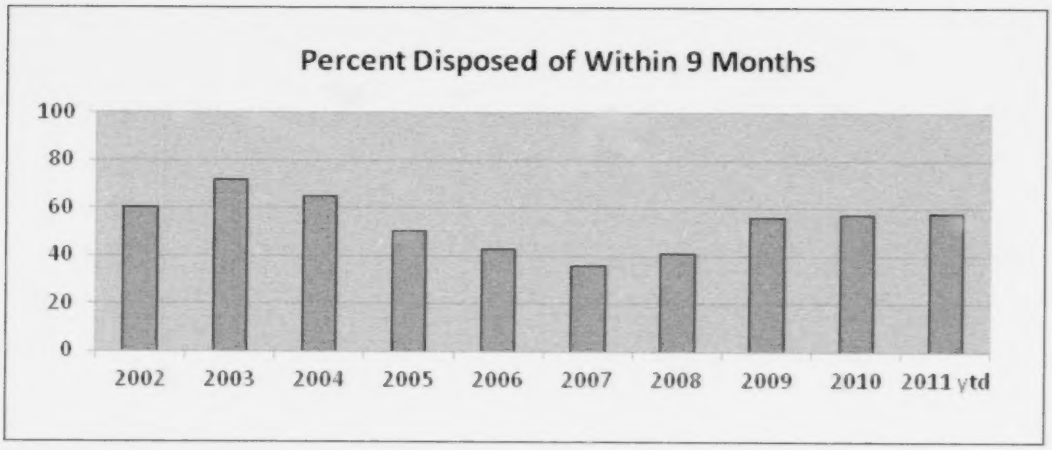
E. Notice of Appeal (Dormant cases)

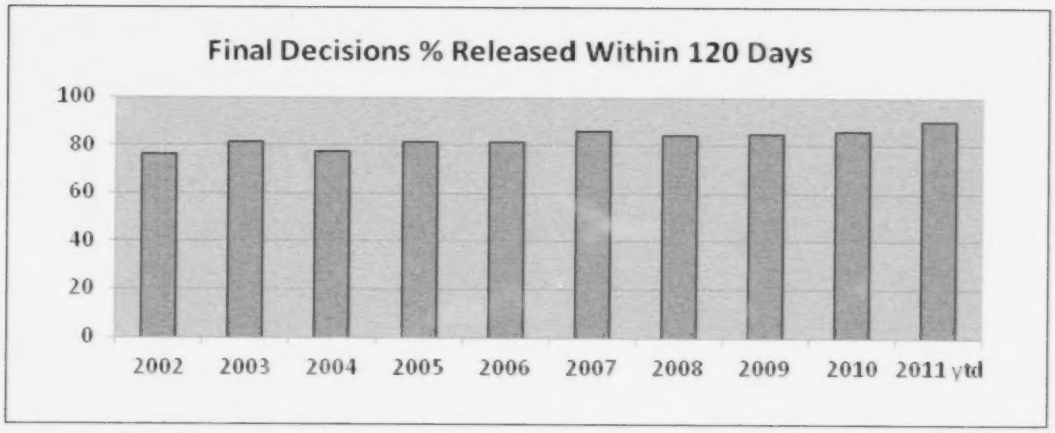
| Period | Total Dormant | Change from previous quarter |
|---|---|---|
| Q1-2010 | 1185 | -16 |
| Q2-2010 | 1267 | 82 |
| Q3-2010 | 1335 | 68 |
| Q4-2010 | 1317 | -18 |
| Q1-2011 | 1400 | 83 |
| Q2-2011 | 1367 | -33 |

F. Production Charts: Annual from 2002 up to the end of the current quarter




Percent Disposed of Within 9 Months
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011 ytd


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011 ytd

## Judicial Review Activity

**Second Quarter 2011**

The status of applications for judicial review involving the Tribunal for the second quarter of 2011 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

**1. Decisions Nos.1007/08 (May 9, 2008) and 1007/08R (October 20, 2008)**

The worker, a police officer, was granted entitlement for a neck and back/shoulder injury in 1975. In 1979 he suffered injuries to his chest, neck, upper back and left shoulder, for which he was granted a 10% permanent disability award. He injured his low back in 1986, for which he was granted two weeks of benefits. In 1999 an ARO granted the worker entitlement for a stomach ulcer caused by his pain medication, but denied ongoing entitlement for his low back from the 1986 injury. In a 2003 ARO decision the worker was denied an increase to his 10% pension. In a 2006 ARO decision the worker was denied ongoing entitlement for his shoulder and neck from the 1975 accident, a permanent disability award arising from that accident, and also denied a pension assessment for his ulcer.

The worker appealed to the Tribunal for:

1) ongoing entitlement and a pension assessment for the 1975 left shoulder and neck injury;
2) entitlement to a pension assessment for a stomach ulcer and stomach surgery from the 1979 injury;
3) a pension award for neck and shoulder injury under the 1979 injury;
4) an increase in the 10% pension award for his back and shoulder from the 1979 injury;
5) a pension assessment for a back condition from the 1986 injury.

The worker's appeal was denied. The Vice-Chair found that there was no ongoing entitlement for a shoulder and neck injury, and no entitlement for a pension assessment from the 1975 accident. The medical evidence indicated there were no ongoing problems that were related to this accident.

Similarly the Vice-Chair found there was no entitlement to a pension for the worker's stomach ulcer or stomach surgery from the 1979 accident because there was no ongoing disability related to his stomach. There was no entitlement for a pension for his neck and left shoulder because there was no objective evidence of an organic impairment. The 10% award for the thoracic spine and intrascapular left shoulder remained appropriate as it reflected the worker's level of disability.

The Vice-Chair also held there was no ongoing entitlement for the 1986 accident, and hence no pension assessment was in order.

The worker's application for reconsideration was denied.

The worker commenced an application for judicial review, arguing all the above issues should have been granted except for issue #2. The respondent employer police department participated in the judicial review as a co-respondent with the Tribunal.

The judicial review was heard on February 17, 2011. The Panel of Justices Cunningham, Swinton and Herman unanimously dismissed the judicial review.

At the start of the hearing the Applicant narrowed the issues in the case to ongoing entitlement for only the 1975 accident. The Court found the Tribunal had appropriately considered all of the evidence, including the medical evidence. The Applicant's argument that the Tribunal had misapprehended certain medical reports was not accepted.

--

A month after the release of this decision, counsel for the worker filed a notice of appeal to the Court of Appeal. Worker's counsel took the position that leave to appeal a decision of the Divisional Court was not required on a question of fact alone. His appeal was served and filed with the Court of Appeal.

The Tribunal disputed the Applicant's interpretation of section 6(1) of the *Courts of Justice Act*. The Tribunal argued that leave to appeal was required. The Deputy Registrar of the Court of Appeal agreed with the Tribunal and stayed the appeal.

In May, counsel for the worker agreed that the appeal be dismissed by the Registrar.

**2. Decisions Nos.832/04 (November 18, 2004) and 832/04R (April 5, 2007)**

The worker left work due to back pain. Two weeks later the worker alleged the pain was due to an injury at work. The Board denied entitlement on the grounds it was not shown that an accident occurred in the course of employment.

The worker's appeal to the Tribunal was denied. The Vice-Chair noted the worker had a pre-existing non-compensable back condition, and there was an absence of any medical supporting the position that the back condition was caused by disablement from the nature of the work. The worker's alternative explanation that there was an accident involving carrying a ladder was not supported by the evidence. A request for reconsideration was denied.

The worker commenced an application for judicial review. The worker included with her application an affidavit alleging that comments made by the Vice-Chair prior to the hearing raised an apprehension of bias.

This French language judicial review was heard in Ottawa in May 2011 by a Divisional Court Panel of Justices Janet Wilson, Swinton and De Sousa. The Panel unanimously dismissed the application, finding that there was no reasonable apprehension of bias because the Court found the Vice-Chair did not say the words that had been attributed to him. The Court also found that the Tribunal's reasoning was clear and the conclusions were based on evidence, and therefore the first decision and the reconsideration decision were reasonable.

3. **Decisions Nos.717/08 (April 30, 2008) and 717/08R (October 23, 2008)**

This is another French language judicial review that was scheduled to be heard in Ottawa in May.

The worker appealed to the Tribunal for an increase to his long term earnings basis from May 2000 to January 2003. He also appealed the Board's finding that a suitable employment or business (SEB) for the worker would be a mail and message distribution occupation, as this finding had resulted in a reduction to his loss of earnings benefits. The Panel allowed the worker's appeal. It directed the Board to recalculate the worker's long term average earnings from May 2000 to January 2003, found the SEB was not appropriate, and that the worker's loss of earnings benefits should be based on a higher hourly wage.

However, the worker requested a reconsideration of the Tribunal decision. He alleged the calculation of his long term earnings should have been higher, the Panel should have made the actual calculations rather than referring this to the Board, his short term earnings should have been higher, and took issue with some procedural rulings made by the Panel during his hearing.

In the reconsideration decision, the same Vice-Chair, sitting alone, denied the request for reconsideration. She found that the relevant law and policy had been applied to determine the time periods on which the calculation of long-term earnings should be based. She found no error in referring the calculation of earnings to the Board. Further, the Tribunal had no jurisdiction to make findings on short term earnings because there was no final decision of the Board on that issue. She did not accept that the procedural allegations of the worker had any impact on the Panel's decision.

The worker, who was representing himself, first attempted to commence an appeal of the Tribunal's decision. Subsequently the worker retained counsel, who started an application for judicial review. The worker's counsel advised that she was revising the materials filed with the Court, but her application materials became muddled. The Ottawa Divisional Court had set a date for February 17, 2010, requiring the Tribunal to retain outside counsel in Ottawa to assist in bringing a motion for an order adjourning the judicial review and extending the time for filing a Record and factums. Justice Lalonde ordered that the matter not be set down for hearing without the order of the court.

Counsel for the worker failed to abide by times indicated in the consent order to serve and file her materials. Despite the order of Justice Lalonde, through an error the Ottawa Divisional Court scheduled the judicial review to be heard during the week of November 8, 2010. The Tribunal was again required to retain outside counsel in Ottawa to resolve this matter. As a result of further representations to the Administrative Judge for the Ottawa Divisional Court, Justice deSousa ordered that the judicial review not go ahead during the week of November 8, and that further materials could be filed on behalf of the worker only with the prior approval of the Divisional Court.

Despite the above orders and the Applicant's failure to comply by the times in the consent order, the matter was again listed for hearing in March 2011. The Tribunal would not consent to a further extension for the Applicant to file materials, which

required the Applicant to bring a motion to extend the time to file an amended factum. The Tribunal then filed its factum. The judicial review was scheduled to be heard on May 11, 2011.

On the day before the Divisional Court hearing the worker abandoned the judicial review. Counsel for the worker had assessed the worker's wage loss from his alleged earnings basis, and concluded that even if the judicial review had been successful there would have been little net benefit to the worker.

**4. Decisions Nos.1248/98 (November 13, 2003) and 1248/98R (October 11, 2007)**

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest, and ribs that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. He was self-represented. The Tribunal filed its Record of Proceedings. The worker refused to pay for the hearing transcripts he ordered, or to file a factum. As a result of telephone calls which the worker made to Tribunal staff, the Tribunal would not accept further telephone calls from the worker.

The worker asked the Divisional Court for an extension of time in which to perfect his judicial review application. The Tribunal and the employer (the Tribunal's co-respondent) took no position on the request. The Court granted the request and the worker had until the end of June 2009 to perfect the judicial review application. He failed to perfect in time. In March 2010 the worker served the Tribunal with a Notice of Abandonment.

The next day the Tribunal was advised by the Divisional Court Office that the worker had changed his name, and filed a new judicial review application. The new application was the same as the one he had just abandoned, except that the worker now identified himself as a different person under his new name.

The employer indicated that it would bring a motion to strike the worker's new judicial review application. The Tribunal advised it would support that motion. As the worker indicated he was not available until November 2010, the motion was scheduled to be heard on November 10, 2010. In July 2010, the worker served a handwritten Notice of Abandonment of his latest judicial review, but despite repeated requests by both respondents he has failed to file it with the Divisional Court. In early November 2010, the employer withdrew its motion to give the worker more time to file his Notice of Abandonment. In late November 2010, the employer wrote to the worker to request that he file his Notice of Abandonment immediately or provide his availability over the next three months to have the motion heard. The worker did not respond.

The Divisional Court sent a notice to the worker that it would dismiss the judicial review application administratively on April 14, 2011 if it was not perfected by that time. The worker did not respond. On April 15, 2011 the Divisional Court Registrar dismissed the judicial review.

**5. Decision No.2305/08 (November 18, 2008)**

The worker's appeal to the Tribunal for entitlement on the grounds she sustained a new injury, or aggravated a pre-existing condition at work, was denied. The worker commenced a judicial review alleging that the interpreter at the hearing did not properly interpret the proceedings for the Applicant.

The Tribunal filed its factum. The worker, who was self-represented, had originally demanded an early date for the judicial review. However a considerable period of time went by without the worker confirming that she was available for a hearing. Late last year the Tribunal was contacted by a lawyer who was now representing the worker, and who inquired about commencing a reconsideration application at the Tribunal.

Following discussion with the worker's new counsel, the worker agreed to abandon the judicial review and pay costs to the Tribunal. In May 2011 the worker filed a notice of abandonment with the Divisional Court.

**6. Decisions Nos.774/09 (April 21, 2009) and 774/09R (August 20, 2009)**

The plaintiff was the manager of an apartment building. His regular hours were 8 to 5, Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day, while checking to see if the flooding problem was over, the plaintiff fell and injured himself.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action. The defendant commenced a section 31 application to determine whether the right of action was taken away under the Act.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, he was a worker in the course of his employment when the accident occurred. He fell within the requirements for "time, place and activity" in Board policy. When he checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. Plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was agreed to remove the affidavit. The Tribunal has filed its factum. It is expected that this case will be heard in Ottawa in the fall of 2011.

**7. Decisions Nos.1976/99I (November 30, 1999), 1976/99 (December 12, 2002) and 1976/99R (September 2, 2005)**

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992 for fibromyalgia. The worker did not seek medical treatment from November 1991 until September 2004. She then sought additional benefits for the period after 1992. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia, and denied the appeal.

A different Vice-Chair in the reconsideration decision held the hearing Panel may have been mistaken in making this determination, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, he also held that even if the worker suffered from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker continued to suffer from a work injury, the medical reporting did not relate her ongoing condition to work, there was significant discrepancy in the medical reporting, and her allegation of significant worsening from 1991 to 1994 suggested another intervening cause of her disability.

The worker commenced an application for judicial review. However she was represented by an unlicensed paralegal from Quebec, who did not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings. The worker served her factum. Her factum was improper and in the Tribunal's view should not have been accepted by the Ottawa Divisional Court. The Tribunal raised this with the Ottawa Divisional Court, and on October 12, 2010 Justice Linhares deSousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization before a single justice of Divisional Court to file her factum.

On March 4 2011 the worker's motion to be allowed to file a 55 page factum was heard by Justice Smith in Ottawa. Her request was not granted, but the Court granted her 60 days in which to file a 45 page factum. The Tribunal was granted the right to file a 45 page factum in reply.

Both the worker and the Tribunal have served and filed their factums. At the end of this quarter the Tribunal was waiting for the judicial review to be scheduled. This judicial review will be heard in Ottawa.

**8. Decisions Nos.756/89L (December 11, 1989) and 756/89LR (October 3, 1990)**

In Decision 756/89L, the worker applied for leave to appeal a decision of the old WCB Appeal Board dated November 27, 1978. The Appeal Board decision denied the worker entitlement to benefits for a bilateral knee disability, which he claimed was related to a work accident in 1977. The Appeal Board did not accept that the worker had an accident as he alleged. The Appeal Board denied the worker's reconsideration requests on December 14, 1979; August 15, 1980; October 27, 1983 and September 5, 1984. Two reviews of the worker's file by the Ombudsman did not support that the worker's disability was related to a work accident.

Applying the statutory tests, in its December 1989 decision the Tribunal Panel denied leave, holding there was no substantial new evidence and no reason to doubt the correctness of the Appeal Board's decision.

The worker applied to reconsider Decision 756/89L. The same Panel released Decision 756/89LR on October 3, 1990, which denied the reconsideration.

Over the succeeding twenty years, the worker made a series of further applications for reconsideration. In October of 2010 he commenced an application for judicial review.

As some of the original appeal materials were missing, the Tribunal made strenuous efforts to re-create the file in order to compile a Record of Proceedings. After several months and consulting numerous sources, the Tribunal filed as complete a Record of Proceedings as it could with the Divisional Court.

At the end of the quarter the Tribunal was waiting to receive the worker's factum. This judicial review will be heard in London.

9. **Decisions Nos.1110/06 (November 2, 2006), 1565/08I (July 25, 2008), 1565/08 (May 13, 2020) and 1565/08R (February 9, 2011).**

The worker was injured in June 1990. He was granted an 18% NEL. He was granted a FEL sustainability award at D1 in 1992. He was also granted a FEL supplement while he participated in a vocational rehabilitation program. He was undergoing a retraining program when he was involved in a motor vehicle accident in 1993, forcing him to quit the program. The supplement ended when he withdrew from the program.

At R1 in 1994 the worker was granted a FEL based on earnings which assumed he had been able to complete the training program.

In 1997 the Board ruled that the worker had recovered from the 1990 accident and his ongoing back problems were actually the result of a pre-existing condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal. He claimed he was entitled to a 100% FEL award as he was unable to earn anything in suitable and available employment as a result of the 1990 work accident.

In Decision 1110/06 the Tribunal determined the worker's pre-existing condition had been asymptomatic at the time of the 1990 injury, so the work injury was a significant factor contributing to the worker's ongoing impairment. The Panel held the worker had ongoing entitlement, that he had a permanent impairment, and that the entitlement to benefits he had at the time of the 1997 Board decision should be restored. The Board was directed to reinstate the worker's benefits and determine his past and ongoing benefits.

Following Decision 1110/06, in 2007 the Board made a new FEL determination. The Board found the worker was only partially disabled because of his work injury, and his inability to work was due to the 1993 motor vehicle accident. The Board reinstated the NEL, but did not grant a full FEL. The Board awarded a smaller FEL starting in 1993 as it determined he could work as a civil engineering technician. The worker appealed to the Tribunal again.

In Decision 1565/08I the Panel spent the first day of hearing considering the role of a person who appeared at the hearing with the worker and who characterized herself as a "facilitator". Following a lengthy discussion, it was decided that this person would characterize herself as a "friend" of the worker. As a friend she would qualify under the exemption for a representative as set out in By-Law 4 passed pursuant to the *Law Society Act*. However the Panel brought the circumstances of the case to the attention of the Tribunal Chair.

When the hearing reconvened the Panel considered the worker's arguments that he was totally disabled before his motor vehicle accident, and hence he was entitled to a higher FEL.

In Decision 1565/08 the Panel found the worker was not totally permanently disabled before the motor vehicle accident. The motor vehicle accident had a significant impact on the worker. The Panel found that the worker's inability to earn beyond the level determined by the Board was because of the motor vehicle accident. As a result the Panel upheld the worker's D1 and R1 FEL award as determined by the Board.

However at the R2 date the Board had found the worker would have been able to earn more, and hence have a lower FEL. The Panel allowed the worker's appeal on that issue, finding his earning capacity would not have increased. Thus the worker was entitled to a partial FEL commencing in 1993. The Panel also confirmed the Boards' NEL determination.

In Decision 1565/08R a different Vice-Chair denied the worker's application to reconsider Decision 1565/08, finding the threshold to reconsider had not been met.

The worker commenced an application for judicial review of the above decisions. The worker is self-represented. The precise arguments which the worker intends to make are not yet apparent. The Tribunal has filed a Record of Proceedings. The worker indicated he intended to bring a motion for an order to remove the transcripts from the Record. At the end of the quarter the Tribunal was waiting for the worker to serve his motion.

**10. Decisions Nos.3164/00 (December 18, 2000) and 3164/00R (March 28, 2001)**

The worker was a baker. She injured her back in 1994. She was paid total benefits for about a month until she returned to work, and then for a recurrence for a further seven months. In 1997 she was granted entitlement for a right elbow disability arising out of her job duties.

She appealed for entitlement for a FEL and further vocational rehabilitation arising out of the back injury. She also appealed ongoing entitlement for the right elbow condition. Finally she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

The Vice-Chair granted entitlement to a FEL and vocational rehabilitation assistance for the back injury. He denied entitlement for fibromyalgia and the right arm/elbow.

On reconsideration the worker submitted additional medical documentation in support of her claim for fibromyalgia, but the Vice-Chair found it was insufficient to warrant re-

opening the appeal. The worker made a number of subsequent reconsideration requests which did not meet the threshold to be assigned for review by another panel or vice-chair.

In January of 2011 the worker retained new counsel and commenced an application for judicial review. A concern about the timeliness of this application has been raised with counsel for the worker. In May 2011 the worker's counsel asked if the Tribunal would consent to adjourn the judicial review while the worker pursued a further reconsideration. The Tribunal agreed. In May 2011 the worker submitted a new reconsideration application.

**11. Decisions Nos.1509/02 (February 2, 2004), 1509/02R (September 27, 2006), 2021/07E (October 30, 2007) and 2021/07ER (July 22, 2009)**

Two sisters were suspended at the same time for smoking in a non-smoking area at work in 1999. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (Decision 1384/03). She brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (Decision 1509/02). Sister #2 commenced an application for judicial review in April 2004.

Following discussions with her former counsel, in November 2002 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider Decision 1509/02.

In her reconsideration application the worker alleged the Panel had failed to consider that she had suffered a recurrence of a 1992 injury. Decision 1509/02R was released on September 27, 2006. In that decision the Tribunal found that although the worker had raised a cross-appeal in Decision 1509/02, the worker had not raised entitlement on the basis of a recurrence of the 1992 injury as an issue in that cross-appeal. Consequently, there was no error in Decision 1509/02 and the application for reconsideration was denied.

However, the Vice-Chair in Decision 1509/02R noted that it was still open to the worker to bring an appeal on the recurrence issue to the Tribunal, though it would be necessary to make an application to extend the time to appeal that issue.

The worker retained new counsel, and commenced an application to extend the time to appeal the Board decision. In Decision 2021/07E, the worker's application to extend the time to appeal the issue of recurrence in the June 4, 2001 ARO decision was denied.

The worker commenced an application to reconsider Decision 2021/07E. In Decision 2021/07ER, released July 22, 2009, the Tribunal allowed the reconsideration and granted an extension of time to appeal the recurrence aspect of the ARO Decision.

The Tribunal hearing on the recurrence was heard in October 2010. Decision 2021/07I was released on December 13, 2010. This decision granted the worker's appeal on the basis that her pain in 1999 was a recurrence of the 1992 injury. The worker was given four weeks to decide whether to also ask the Tribunal to address the period of entitlement for benefits for the recurrence.

The worker confirmed that she did not want to pursue this matter further.

The judicial review is still adjourned. The worker's representative has been asked if the judicial review will now be abandoned, and the Tribunal is waiting for a response.

**12. Decisions Nos.1233/08 (June 9, 2008), 1233/08R (May 29, 2009) and 1233/08R2 (April 6, 2010)**

The worker brought an appeal for initial entitlement for respiratory irritation from workplace exposure to paint odours. He was granted initial entitlement and loss of earnings benefits for a few weeks. His appeals for permanent impairment and for psychological entitlement for stress were denied. The worker made a request for reconsideration which was denied.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings and the worker filed his factum.

The Tribunal then determined that it should reconsider its decisions on its own motion. The worker's counsel agreed to place the judicial review on hold pending the outcome of the Tribunal's reconsideration.

The Tribunal released its reconsideration decision, Decision 1233/08R2. That decision found that the worker had not been given a full opportunity at the Tribunal to make submissions on the duration of benefits. The Tribunal's decisions were varied to have the matter of the duration of benefits remitted to the Board, subject to the parties' usual appeal rights.

A decision of the Board then confirmed the same few weeks of benefits. The worker's lawyer wrote to the Tribunal and suggested that he might revive the judicial review, but the Tribunal pointed out that that would be premature. It is expected that the worker will appeal the Board's decision. The judicial review is still on hold pending the worker's appeal.

## Recent Decisions

### Second Quarter 2011

### Mental Stress

In *Decision No. 483/11I* (May 18, 2011), the worker was an educational assistant who was accused of striking a student. The worker was suspended pending an investigation in accordance with protocol. The investigation was completed and the worker was exonerated. The worker claimed entitlement for mental stress.

The Panel found that the worker experienced an unexpected and emotionally traumatic event in the course of her employment. The event caused a disabling psychological injury, namely, depression. She experienced an acute reaction to the sudden and unexpected event. The worker met the requirements of section 13(5) of WSIA. The worker also met the requirements of the Tribunal's average worker test, as an allegation of physical assault of a child, with possible criminal implications, would be reasonably and objectively traumatic to the average worker. The Panel was satisfied that the allegation was a significant contributing factor in the subsequent onset of symptoms.

The legislation does not appear to limit sudden and unexpected traumatic events to events that are threatening to a worker's physical well-being. Certain aspects of OPM Document No. 15-03-02 entitled "Traumatic Mental Stress", however, appear to require actual or threat of physical harm. Some Tribunal decisions have also found that the circumstances must be similar to the policy by involving an objective physical threat to personal security.

There was an apparent inconsistency in the Board policy and in between the policy and the Act. Accordingly, the Panel sought submissions from the Board with respect to the policy and whether it was consistent with s.13(5) which does not seem limited to physical trauma.

### Occupational Disease, Apportionment and Schedule 2 Employers

In *Decision No. 2360/08* (April 20, 2011), the worker was a merchant seaman from 1941 to 1971 for various employers. At age 78, the deceased worker claimed and was granted entitlement for a respiratory condition, including LOE benefits. The Board granted survivors benefits to the worker's family. The Board assigned the costs of the claim to the worker's last employer, a Schedule 2 employer, and that employer appealed (the appellant employer).

The worker had work-related asbestosis from asbestos exposure and chronic obstructive pulmonary disease from cigarette smoking. Both were significant contributors to the worker's respiratory condition. The Panel confirmed initial entitlement for the respiratory condition, but denied LOE benefits as the worker had no loss of earnings as he was retired. The worker was not earning and did not have the potential to earn at the time of the claim. This finding is consistent with other Tribunal authorities on this issue.

The worker died from heart failure associated with respiratory failure. As determined, both asbestosis and COPD were significant contributing factors to the disabling respiratory condition. Both were also significant contributing factors to the worker's death; the worker's death was work-related.

The worker's spouse was entitled to survivor's benefits. Section 48(3) of the WSIA provides that if net average earnings are less than a specified amount, the net average earnings are deemed to be that specified amount. Thus, the worker's spouse was entitled to dependency benefits based on the deemed earnings, even though the worker was not earning at the time of his death. This finding is consistent with other Tribunal authorities on this issue.

*Decision No. 2360/08* is also of particular interest as it considers apportionment among Schedule 2 employers. Section 94 deals with occupational disease entitlement which may occur as a result of more than one employment by a Schedule 2 employer. Section 94(2) indicates that the last employer is considered to be the employer, subject to certain exceptions. Section 94(6) provides that the Board determine the obligation of each employer and provides that employers are liable to make such payments as the Board considers just to the employer who is liable to pay. The nature of Schedule 2 employers is that they have the option of selecting the jurisdiction out of which they choose to base their operations. The Board's enforcement of an apportioned obligation is limited to those employers registered with the Board. In this case, there were only two Schedule 2 employers who registered with the Board. The appellant employer was entitled to cost relief from the other employer who employed the worker for six months, about 2% of his overall employment with Schedule 2 employers engaged in the industry that caused the occupational disease.

**Tribunal Jurisdiction and Assignment of Benefits**

The Tribunal found previously in *Decision No. 1083/05*, that the worker had entitlement for an accident in 2003. The Board deducted from his LOE benefits $15,028 for repayment of welfare benefits and $57,768 for Ontario Disability Support Program (ODSP) benefits received by the worker. The worker appealed the deductions.

In *Decision No. 88/10* (April 7, 2011), the Vice-Chair found that the Tribunal was without jurisdiction to consider the deductions from the worker's LOE benefits to repay welfare and ODSP benefits. Section 64 of WSIA governs the assignment of benefits. Pursuant to section 123(2), the Tribunal does not have jurisdiction to hear appeals from decisions made under s.64. Further the Vice-Chair noted that past Tribunal cases have held that the Tribunal's jurisdiction does not extend to reviewing the conduct of the Board in carrying out its internal processes.

Further, the Tribunal did not have jurisdiction over a direct deposit request for the worker's benefit cheques to a bank in England, where he now lived. The Tribunal did not have jurisdiction over the internal processes of the Board.

Finally, the Tribunal did not have jurisdiction over the worker's request for proof of assignment of LOE benefits to the City for welfare benefits. As the Tribunal did not have jurisdiction over assignments, it did not have jurisdiction to order the Board to provide that there was an assignment. The proper forum for a dispute is a civil proceeding.